IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 485 OF 2007

Smt. Phulabai Namdeo Jadhav.... Petitioner

versus

Appa Bajirao Mahangade 7 ors..... Respondent.

Shri M.N.Dhamal for the petitioner
Shri U.P.Warunjikar for the respondent.

CORAM; A.P. DESHPANDE, J.
DATED; 6TH JULY, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The present petitioner is a Decree Holder whose suit has been decreed. The petitioner had filed a suit for perpetual injunction and she also sought direction against the defendant no.3 to remove the poles of the shed and to hand over the vacant possession of the suit property. The trial court decreed the suit. The respondent no.3 being aggrieved by the judgment and decree passed by the trial court, filed a regular civil appeal before the District Court. During pendency of the appeal, the respondent no.3 constructed unauthorised structure on the suit land. Hence the petitioner applied for amendment of

the plaint before the appellate court who was ceased of the appeal. The appellate court permitted amendment of the plaint and remanded the matter to the trial court for making enquiry in regard to the alleged unauthorised construction carried out by the respondent no.3 during the pendency of the appeal. The trial court recorded the evidence and its findings in favour of the petitioner. In view of this event, during pendency of the appeal, though the first appellate court dismissed the appeal filed by the respondent no.3, it modified the decree. The modified decree reads thus:

> "Appeal is dismissed with costs.
>
> Decree in R.C.S.No.140/1993 is modified as follows:-
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> Plaintiff;s suit is decreed.
>
> The defendants are permanently restrained from causing obstruction to the plaintiff's peaceful possession of the suit property.
>
> Defendant no.3 should remove 415 sq.ft.shed, described in the plaint, within 3 months and should give vacant and peaceful possession of the said encroached upon land to the plaintiff, within 3 months."
>
> (Translated)

3. The modified decree is dated 29-4-2005. The

respondent no.3 did not hand over the vacant possession as directed, after removing the encroachment. Hence the present petitioner/decree holder filed regular Darkast (execution application) on 27-9-2005. A notice came to be issued to the respondent no.3. The respondent filed its reply to the execution application contending therein that on 17-6-2005 the decree holder and the judgment debtor entered into a compromise where under the decree holder agreed that the decree shall not be executed. The judgment debtor thereafter filed an application before the trial court to hold an enquiry touching the terms of the compromise and by permitting the judgment debtor to examine witnesses in support of the compromise. The decree holder as well moved another application and prayed for appointment of Commissioner for removal of the structure with a view to have the decree executed. These two applications moved by the judgment debtor and the decree holder are disposed of by a common order by the executing court. The application moved by the decree holder for appointment of Commissioner has been rejected whereas the application filed by the judgment debtor at Exh.30 is allowed with a direction that both the parties should lead evidence touching the issues framed by the court on that very day. Aggrieved by the common order passed by the trial court dated 7-9-2006 the present writ petition has been filed by the decree holder.

4. The learned counsel for the petitioner/decree holder submits that the plea of compromise/adjustment cannot be entertained by the executing court if the adjustment is not certified or recorded in compliance of provisions of Order 21 Rule 2. Order 21 Rule 2 reads thus:

> *2. Payment out of Court to decree-holder:*
>
> *(1) Where any money payable under a decree of any kind is paid out of Court, or a decree of any kind is otherwise adjusted in whole or in part to the satisfaction of the decree holder, the decree holder shall certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly.*
>
> *(2) The judgment debtor or any person who has become surety for the judgment debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record*

the same accordingly.

(2-A) No payment or adjustment shall be recorded at the instance of the judgment debtor unless-

a) the payment is made in the manner, provided in rule 1 , or

b) the payment or adjustment is proved by documentary evidence; or

c) the payment or adjustment is admitted by, or on behalf of, the decree holder in his reply to the notice given under sub-rule (2) of rule 1 or before the court.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any court executing the decree.

5. It is the case of the judgment debtor that the decree has been satisfied fully and the same is not executable. Admittedly in the present case the decree holder has not certified the adjustment, as claimed by the judgment debtor, to the court and the court has not recorded the same. The judgment debtor has also

not informed the court about the adjustment and had not applied to the court as per rule 2 of sub rule 2 for issuing a notice to the decree holder and hence the case is not covered by rule 2 sub rule 2. In the absence of certification and its recording by the court, the learned counsel for the petitioner submits that the said adjustment cannot be recognised by the court executing the decree. Emphasis is led on the phraseology used under rule 2 sub rule 3 which reads thus:

> *The payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any court executing the decree."*

6. The learned counsel submits that only such adjustment could be recognised by the court executing decree which is in conformity with the two conditions of certification and recording. The learned counsel for the petitioner has then submitted that section 47 though wide enough to cover all the questions relating to execution, discharge or satisfaction, a portion thereof is carved out and comprise in Order 21 Rule 2. In otherwards the submission is that the cases falling under Order 21, Rule 2 would stand excluded from the purview of section 47 of CPC.

7. The learned counsel for the petitioner has placed

reliance on a judgment of the Supreme Court in the case of **Sultana Begum Vs. Prem Chand Jain reported in (1997) 1 S.C.C. 373.** While considering an identical submission the Supreme Court has held that an uncertified payment of money or adjustment which is not recorded by the court under Order 21 Rule 2, cannot be recognised by the Executing Court. It is further observed that " In a situation like this the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and/or certified by the court, the executing court would not recognise them and will proceed to execute the decree." In the present case perusal of the compromise purportedly entered into between the decree holder and the judgment debtor clearly reveals that the plea set up by the judgment debtor is one of adjustment and satisfaction of decree to the full extent. It has also come on record that the compromise, on the basis of which adjustment or satisfaction of decree is claimed is neither certified nor recorded.

8. While considering the applicability of section 47

of CPC viz-a-viz Order 21 Rule 3, the Supreme Court has held thus:

> *"Section 47, as pointed out earlier, gives full jurisdiction and power to the executing court to decide all questions relating to execution, discharge and satisfaction of the decree. Order 21 Rule 3, however, places a restraint on the exercise of that power by providing that the executing court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment debtor before the executing court, the latter, in view of the legislative mandate, has to ignore it if it has not been certified or recorded by the court.*
>
> *The general power of deciding questions relating to execution, discharge or satisfaction of decree under section 47 can thus be exercised subject to the restriction placed by Order 21 Rule 2 including sub-rule (3) which contain special provisions regulating payment of money due under a decree outside the court or in any other manner adjusting the decree. The general provision under section 47 has, therefore, to yield to*

that extent to the special provisions contained in Order 21 Rule 2 which have been enacted to prevent a judgment debtor from setting up false or cooked-up pleas so as to prolong or delay the execution proceedings.

If section 47 and Order 21 Rule 2 are read together, as has been done by us in this case, the so called conflict (we say "so called" as, in fact, there is none) stands dispelled by employing the rule of "harmonious construction" or the other rule that the general provision must yield to the special provision."

9. Perusal of the above paragraphs leaves no room of doubt that provision contained in Order 21 Rule 2 being special provision, the general provision contained in section 47 must yield to it. If parties are permitted to lead evidence by opening up an enquiry under section 47, will go to defeat the object sought to be achieved by Order 21 Rule 2. in as much as the judgment debtor would be able to set up a false or a cooked up plea and prolong and delay the execution proceedings. The judgment of the Supreme Court in the case referred to hereinabove has been followed in yet another decision of the Supreme Court in case of **Lakshmi Narayan Vs. S.S.Pandian reported**

in AIR 2000 S.C. page 2757.

10. Per contra the learned counsel for the respondent judgment debtor has contended that though there is no adjustment certified are recorded under Rule 2, the executing court has jurisdiction to enquire into the terms of compromise by holding an enquiry under section 47. This submission cannot be accepted in view of law laid down by the Supreme Court in case of **Sultana Begum Vs. Prem Chand Jain.** As the provisions contained in Order 21 Rule 2 are aimed at protecting the executability of the decree, a decree cannot be permitted to be rendered in executable unless adjustment is certified and recorded as mandate by sub-rule 2 of Order 21. Having regard to the mandate of sub rule (3) of Rule 2 or Order 21, the trial court could not have postponed the execution of the decree and permitted the judgment debtor to lead evidence touching the terms of the compromise or adjustment or satisfaction. By the impugned order the very purpose sought to be achieved by Order 21 (2)(3) stands defeated. The impugned order thus is wholly unsustainable in law.

11. The learned counsel for the respondent has relied upon the following judgments in support of the submission.

1. M.P. Shreevastava Vs. Mrs. Veena

reported in AIR 1967 S.C. page 1193.

2. P.S. Gulam Mohammed Rowther Vs. Narendranath Reddi & ors. reported in AIR 1963 Madras page 261.

3. Ramnath Sarma Vs. Baidyanath Chatterjee reported in AIR 1954 Calcutta page 620.

So far as the judgment reported in *AIR 1967 S.C. page 1193* is concerned, the same is not applicable to the facts of the present case, as the question involved in the present petition is not addressed in the said judgment. I do not propose to deal with the other judgments as the same are delivered by the High Courts and as Supreme Court judgments are available on the point. Hence writ petition is allowed. The impugned order passed by the executing Court is quashed and set aside and the executing Court is directed to proceed with the execution application further in accordance with the law. Rule made absolute in the above terms.

12. At this stage the learned counsel for the respondent judgment debtor seeks stay of this order for a period of eight weeks. The prayer is just and reasonable and the same is granted.

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